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ALEXANDER L. STEVAS,
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No. 84-530 (2)

IN THE

Supreme Court of the United States

October Term, 1984

ROMAN WELYCZKO,

Petitioner,

against

USAIR, INC. and THOMAS POMEROY as Chairman of the International Association of Machinists and Aerospace Workers, Local No. 75, District No. 141,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for Respondent USAir, Inc. in Opposition

ANDREW J. STITES
USAIR, INC.
Washington National Airport
Washington, DC 20001
(703) 892-7194

MELVIN H. OSTERMAN, JR.
Counsel of Record
JONATHAN P. NYE
WHITEMAN OSTERMAN & HANNA
One Commerce Plaza
Albany, NY 12260
(518) 449-7600

Attorneys for Respondent USAir, Inc.

November 2, 1984

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Questions Presented

The Questions Presented are adequately set forth in the Petition for a Writ of Certiorari ("Petition").

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*Pursuant to Rule 28.1, respondent USAir, Inc. states that it and USAir Finance, N.V., are wholly owned subsidiaries of USAir Group, Inc.

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ROMAN WELYCZKO,

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Brief for Respondent USAir, Inc. in Opposition

Respondent USAir, Inc. ("USAir") respectfully requests the Court to deny the petition for a writ of certiorari to review the judgment, opinion and order of the United States Court of Appeals for the Second Circuit in this case.

Statement of the Case

Petitioner Roman Welyczko was terminated from his employment with Respondent USAir on August 27, 1975, retroactive to August 4, for failure to provide requested substantiation of his request for an extension of a 90 day medical leave. Welyczko alleges that he orally requested representatives of his union, the International Association of Machinists and Aerospace Workers ("IAM"), to file a grievance on his behalf, which was never done. On March 6, 1981, five and one-half years later, Welyczko commenced this action, alleging wrongful discharge by USAir and the breach of the duty of fair representation by the IAM.

In June of 1983, ending a long period of uncertainty, the Court determined in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), that the six-month statute of limitations provided by section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1970), should be applied to an employee's suit against his or her employer and union under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976). Although Welyczko's claims must be construed as arising under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), Welyczko does not contend that this distinction is meaningful. *See* Petitioner's App. at 29-30. *See also Barina v. Gulf Trading and Transportation Co.*, 726 F.2d 560, 563 n.6 (9th Cir. 1984).

The sole issue Welyczko seeks to bring before the Court, apparently, is his claim that the rule derived from the Court's decision in *DelCostello* may not be applied to his cause of action.

Reasons for Denying the Writ

I.

The Second Circuit correctly held that the rule in *DelCostello* is to be applied to pending actions.

The issue Welyczko seeks to bring before the Court, whether the rule in *DelCostello* is to be applied to pending actions, is one that has been addressed, and resolved adversely to Welyczko, by the United States Court of Appeals for the Second Circuit in this case, and by the Courts of Appeals for the First (*Graves v. Smith's Transfer Corp.*, 736 F.2d 819 [1st Cir. 1984]); Third (*Perez v. Dana Corp.*, 718 F.2d 581 [3d Cir. 1983]); Fourth (*Murray v. Branch Motor Express Co.*, 723 F.2d 146 [4th Cir. 1983], *cert. denied*, No. 83-1967 [U.S. Oct. 15, 1984]); Fifth (*Edwards v. Sea-Land Service, Inc.*, 720 F.2d 857 [5th Cir. 1983]); Sixth (*Curtis v. International Brotherhood of Teamsters Local 299*, 716 F.2d 360 [6th Cir. 1983] [dictum]); Seventh (*Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 [7th Cir. 1983], *cert. denied*, 104 S. Ct. 976 [1984]); Eighth (*Lincoln v. District 9, International Association of Machinists*, 723 F.2d 627 [8th Cir. 1983]), and Eleventh (*Erkins v. United Steel Workers*, 723 F.2d 837 [11th Cir.], *cert. denied*, 104 S. Ct. 3517 [1984]) Circuits. Only the Ninth Circuit has declined to apply the *DelCostello* rule in pending cases, *see, e.g., Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); and that court perceived a justification peculiar to that circuit for its refusal. *See Edwards*, 719 F.2d at 1040.

Each of these courts considered the issue now raised by Welyczko, and each concluded that departure from the principle that judicial decisions have retrospective as well as prospective effect would, in light of the policies articulated by the Court in *DelCostello*, be inappropriate. The only point asserted by Welyczko to be peculiar to his case is that no grievance was initiated on his behalf. Petition, 10-11. That, however, is insufficient to distinguish his case or to warrant a different result. No principle of law or national labor relations policy mandates that an evidentiary hearing be held with respect to every grievance.

II.

The issue presented is insubstantial.

On at least seven occasions the Court has declined to review decisions concerning the application of the rule in *DelCostello* to pending actions. *See Erkins v. United Steel Workers*, 723 F.2d 837 (11th Cir.), *cert. denied*, 104 S. Ct. 3517 (1984); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, No. 83-1967 (U.S. Oct. 15, 1984); *McNaughton v. Dillingham Corp.*, 722 F.2d 1459 (9th Cir.), *cert. denied*, No. 83-1739 (U.S. Oct. 15, 1984); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, No. 83-1958 (U.S. Oct. 15, 1984); *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1599 (1984); *Ernst v. Indiana Bell Telephone Co.*, 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 707 (1984); *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 289 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 976 (1984). Welyczko has presented no novel issue or unique circumstance sufficient to distinguish this case from those that the Court previously has declined to consider.

III.

The result sought by Welyczko would be inconsistent with the Court's decision in *DelCostello*.

The result sought by Welyczko would be inconsistent with action previously taken by the Court in reversing *Flowers v. United Steel Workers*, 671 F.2d 87 (2d Cir. 1982), *rev'd* 462 U.S. 151 (1983), decided as a companion case to *DelCostello*. In *Flowers*, the Court reversed the United States Court of Appeals for the Second Circuit and dismissed the complaint as untimely under the simultaneously announced rule. Because the Court has already applied the *DelCostello* rule to a cause of action from the Second Circuit, Welyczko is effectively requesting the Court to reconsider its determination in *DelCostello* or to grant preferential treatment to his own particular claim.

Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

ANDREW J. STITES
USAir, Inc.
Washington National Airport
Washington, DC 20001
(703) 892-7194

MELVIN H. OSTERMAN, JR.
Counsel of Record
JONATHAN P. NYE
Whiteman Osterman & Hanna
One Commerce Plaza
Albany, NY 12260
(518) 449-7600

Attorneys for Respondent USAir, Inc.

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